North American Enclosures, Inc. *and* Local 348-S, United Food and Commercial Workers Union, AFL–CIO. Cases 29–CA–25492 and 29–CA–25550

June 18, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On February 6, 2004, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, North American Enclosures, Inc., Central Islip, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 18, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT photograph our employees while they engage in activities on behalf of Local 348-S United Food and Commercial Workers Union, AFL–CIO (the Union), or engage in other protected concerted activities, without proper justification.

WE WILL NOT threaten our employees with discharge, job loss or other reprisals, if they support the Union or if they vote for the Union in an NLRB election.

WE WILL NOT promise our employees wage increases, or other benefits and improvements in their terms and conditions of employment, if our employees withdraw their support from the Union or vote against the Union in an NLRB election.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

NORTH AMERICAN ENCLOSURES, INC.

Joanna Piepgrass, Esq., for the General Counsel.

Thomas Bianco, Esq. and *David Greenhaus, Esq. (Kaufman, Schneider & Bianco, LLP)*, of Jericho, New York, for the Respondent.

Warren Mangan, Esq. and *James Murray, Esq. (O'Connor & Mangan, P.C.)*, of Long Island City, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by Local 348-S United Food and Commercial Workers Union, AFL–CIO (the Union or Local 348), the Regional Director for Region 29, issued an order consolidating cases, consolidated complaint and notice of

hearing, on August 28, 2003,[1] alleging that North American Enclosures, Inc. (Respondent), violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities, by threatening employees with termination if they supported the Union, and by promising employees improved benefits and working conditions if they did not support the Union.

The trial with respect to the above allegations was held before me in Brooklyn, New York, on October 29, and November 3. The complaint was amended during the course of the trial.[2] A brief has been submitted by the Respondent. The General Counsel submitted a letter in lieu of a formal brief. Based upon my careful consideration of these documents, as well as the entire record, including the demeanor of the witnesses, I issue the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent is a domestic corporation, with its principal office located at 65 Jetson Lane, Central Islip, New York, and with other facilities located at 85 Jetson Lane, and 973 Motor Parkway, where it is engaged in the manufacture, assembly, and wholesale distribution of picture frames and framed art.

During the past year, Respondent purchased and received at its New York State facilities supplies and materials valued in excess of $50,000 directly from points located outside the State of New York.

It is admitted and I so find that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted and I so find that the Union is and has been a labor organization within the meaning of Section 2(2) of the Act.

II. PRIOR RELATED CASE—CASE 29–RC–10007

Pursuant to a petition filed by the Union, an election was held on April 24. A majority of votes were cast for the Union. Respondent filed objections, and a hearing was held before a hearing officer of the Region based upon said objections. The hearing officer recommended that the objections be overruled. Respondent appealed that decision, and the matter is still pending before the Board.

III. THE AMENDMENTS

The complaint alleged that on various dates from on or about April 1 to 22, 2003, Respondent, by Norman Grafstein and Brian Gibbons, made unlawful threats and promises to employees in violation of Section 8(a)(1) of the Act.

At the opening of the trial, General Counsel moved to amend the complaint, to change the date of April 1 to March 25, 2003. Respondent objected to the amendment which I granted.

In this regard, Respondent notes that in Case 29–CA–25512 filed on April 1, 2003, the Union alleged that Grafstein, at a meeting on March 25, 2003, promised employees a wage increase if they voted no regarding union representation. This charge was withdrawn by the Union, and approved by the Regional Director on May 6. Similarly in Case 29–CA–25528, filed on April 9, 2003, the Union filed charges, alleging the identical conduct, as in Case 29–CA–25512. The Regional Director approved the withdrawal of this charge on July 28, 2003.

Notably, the amended charge in Case 29–CA–25492 filed on July 16, 2003, alleges that Respondent by its managers, supervisors, and agents, has engaged in threats of discharge and other forms of reprisal against its employees due to their support for the Union, and made promises of improved benefits and working conditions if the unit employees withheld their support for the Union.

Respondent relying on *Winer Motors, Inc.*, 265 NLRB 1457, 1458–1459 (1982), asserts that the amendments should not have been permitted, since the withdrawn charges allege that Respondent engaged in the same conduct, making specific reference to March 25, 2003. Thus Respondent contends, that the amendment is barred by Section 10(b) of the Act. Moreover, it also argues that the amendment was not "just," since Respondent was "sand bagged" by the late amendment. *New York Post Corp.*, 283 NLRB 430, 431 (1987). I disagree with Respondent's contentions, and reaffirm my ruling to permit the amendment.

Although *Winer Motors* precludes the reinstatement of a previously withdrawn charge, that holding is not dispositive here, since unlike *Winer Motors*, the still existent charges are sufficient to warrant the granting of the amendments. Thus the amended charge which has not been withdrawn, alleges unlawful threats to discharge and promises of benefit by Respondent. Although this charge does not refer to a specific date that these events occurred, that omission is not consequential. The amendment to the complaint, merely changed the starting date of the incidents from April 1 to March 25. Clearly the amendment is encompassed by the amended charge, and under the Board's standards in *Redd-I, Inc.*, 298 NLRB 1115 (1988), is closely related to the amended charge. *Pioneer Hotel & Gambling Hall*, 324 NLRB 918 fn. 1 (1997); *NLRB v. CWI of Maryland*, 127 F.3d 319, 327–328 (4th Cir. 1997).

Further, Respondent's contention that the granting of the amendment was "unjust," due to its lateness, is also without merit. To the extent that Respondent argues that it was "sand bagged," and unprepared to defend against any allegation of unlawful conduct on March 25, I informed Respondent when I granted the amendment that if Respondent needed additional time to prepare its case after the General Counsel presented its evidence, I would grant it an adjournment for this purpose. Further Respondent was granted a 5-day adjournment, after the General Counsel completed its case, to prepare its case, during which it had ample time to meet the amended allegations. Thus Respondent failed to show that it was prejudiced in any way by

[1] All dates hereinafter referred are in 2003 unless otherwise indicated.

[2] After the close of the trial, pursuant to the previous agreement of the parties, Respondent requested that certain documents marked as R. Exhs. 4A–G and 5A–G be received into evidence. The General Counsel stated that it had no objection to the receipt of the material. The Charging Party has not objected. I therefore receive R. Exhs. 4A–G and 5A–G into evidence.

my granting the General Counsel's motion to amend the complaint. *Children's Mercy Hospital*, 311 NLRB 204 fn. 2 (1993); *Carpenters Local 35 (Construction Employers Assn.)*, 317 NLRB 18 (1995).

I also note in this regard that Respondent did in fact call a witness to respond to the allegations dealing with the events of March 25.

General Counsel also moved to amend the complaint, on the second day of the hearing, by adding an additional supervisor and agent, Nick Buelna to the complaint allegation of unlawful surveillance. The complaint alleged that on or about April 2, Respondent engaged in video and photographic surveillance of its employees by Norman and Steven Grafstein.

On the first day of the hearing, October 29, 2003, a witness Yessinia Maraber testified about seeing a individual she described as "Mexican," who was with the Respondent's president, Norman Grafstein, and who on April 2, was taking pictures of employees, talking with union representatives, and that the Mexican also took a picture of her, while she was talking to union representatives.

After she was cross-examined by Respondent about that, as well as other portions of her testimony, the Charging Party called Jose Merced, a union representative to the stand. Merced was asked if he could identify the "Mexican" individual described by Maraber in her testimony. Merced testified that he knew the individual to be Nick Buelna as a vice president of Respondent. He further asserted that he believed Buelna to be the person described by Maraber in her testimony, since he is the only "Mexican" official of Respondent that was present at the facility during the organizing drive on a regular basis.

Respondent objected to any testimony about Buelna, in part because the complaint made no reference to him, and that the testimony is time barred. I allowed the testimony to remain on the record, but indicated that I had serious concerns about the fact that the complaint did not include any allegation concerning Buelna's status or conduct. I noted that since there was testimony that Grafstein, an admitted agent was present when the pictures were taken by Buelna, that could be sufficient to hold Respondent responsible for Buelna's picture taking. At that time Charging Party introduced into the record a tape recording of certain events, which among other things showed an individual, alleged to be Buelna at the facility with Grafstein.

After an off the record discussion, I granted Respondent's request for an adjournment from October 29 to November 3, in order to prepare its case, and to examine the tape recording introduced by the Charging Party.

At the beginning of the resumption of the trial on November 3, the General Counsel moved to amend the complaint to name Buelna as an agent of Respondent and as having engaged in photographic surveillance.[3]

Respondent objected to the amendment, pointing out among other reasons, that Buelna is in California, and not available as a witness. Respondent also argued that General Counsel knew about the incident since April, when Maraber furnished her affidavit.

In that connection, the affidavit of Maraber dated April 3, referred to the incident of April 2, and described a "Mexican" person who she did not know walking around with Grafstein and stated that she observed this person take pictures of union reps talking with workers, and then this same person 15 minutes later took a picture of her as she stopped to talk with union representatives.

The General Counsel explained that it did not move to amend the complaint earlier, because it did not know the identity of the person, until the trial, when Merced the union representative was able to piece together Maraber's testimony, the tape, and his own observations, to conclude that the individual Maraber testified about was Nick Buelna.

I granted the motion to amend the complaint, but informed Respondent that I would grant it an adjournment, if Respondent deems it necessary, to arrange to bring in Buelna to testify.

The trial proceeded. General Counsel completed its case and rested. Respondent called its only witness Kimberly Rodriquez, its human resources manager. After completing the testimony of this witness, Respondent decided not to request an adjournment to call Buelna as a witness. Instead, the record was left open to receive documentary evidence from Respondent's files with regard to Buelna's travel records. These documents, as noted, were submitted and received into the record.

Respondent argues that since the General Counsel knew about the incident involving Buelna in April, and waited until the trial in November, to amend, this unexplained delay requires that the amendment be denied. *Consolidated Printers Inc.*, 305 NLRB 1061, 1063–1064 (1992). Respondent further asserts that it was prejudiced by the late amendment, since Buelna was in California, and not easily accessible. *New York Post*, supra.

Once again, I disagree with Respondent's contentions, and shall reaffirm my ruling permitting this amendment as well.

Contrary to Respondent's argument, unlike *Consolidated Printers* and *New York Post*, the General Counsel did explain its delay in not amending the complaint earlier. Although if Respondent knew about the incident from Maraber's affidavit of April 2, the affidavit did not identity Buelna, nor did it discuss his status, other than that she saw him with Grafstein. Further, it was not until the trial, when Merced with the assistance of the tape recording and Maraber's testimony, was able to identify Buelna by name and title. I find this to be a reasonable explanation for the late amendments.

Furthermore, also unlike *New York Post* and *Consolidated Printers*, the amended allegations are identical to the allegations in the complaint, except for the addition of a new agent. Thus in *New York Post*, the amendment added an allegation of unreasonable delay to the complaint allegation of refusal to supply information. In *Consolidated Printers*, the General Counsel sought to amend the complaint to allege that a portion of Respondent's defense, i.e., that it had delayed implementation of the layoffs until the Board election balloting was conducted violating Section 8(a)(3). Both of these amendments, unlike the present case, were granted at the close of the trial,

[3] General Counsel had notified Respondent on Friday afternoon, October 31, that it had intended to amend the complaint when the trial resumed on November 3.

after all the evidence was presented, and involved significantly different allegations than the initial complaint. This was deemed to be prejudicial to the Respondents in those cases.

Here, no such prejudice has been demonstrated. The amendment was granted before Respondent presented its case, and it involved the identical allegation as in the complaint, albeit involving a different agent. Respondent's contention that it was prejudiced by the fact that Buelna was in California at the time and inaccessible is without merit. I informed Respondent when I granted the amendment, over its objection, based in part in Buelna's absence, that I would grant it an adjournment to enable it to bring in Buelna to testify, if it so desired. Respondent opted not to do so, and decided to introduce documentary evidence with respect to Buelna's travel records instead. In these circumstances, Respondent had failed to show that it was prejudiced in any way by not granting of General Counsel's motion to amend the complaint. *Children's Mercy Hospital*, supra; *Local 35 Carpenters (Construction Employers Assn.)*, supra.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. Surveillance

1. Facts

Employee Yessenia Maraber testified that on April 2, as she was leaving work, she saw an individual who she described as a "Mexican," with brown hair, a moustache, and wearing a pin with a Mexican flag, and who spoke Mexican. She observed him walking outside the facility with Norman Grafstein and Brian Gibbons. She further testified that she saw the "Mexican."[4] She observed the Mexican taking pictures of employees talking with Union representatives Dennis and Anthony. The employees and union representatives were across the street from Respondent's premises. The Mexican was standing about seven feet away from the employees and the union representatives when Maraber asserts that she saw him taking pictures with a camera.

Maraber further testified that she observed these events from the parking lot, and several minutes later, she drove her car to the area where the union representatives were standing. She then began to converse with the union representatives, and noticed that the "Mexican" pointed a camera with a "flash" at her, while she was speaking with them.

In her affidavit, which was signed on April 3, although she recounted the events concerning the incident with the "Mexican" taking pictures of her and other employees talking with union representatives, the affidavit did not reflect that Grafstein or Gibbons were present with the Mexican at that time. Maraber was asked about that omission from her affidavit, and claimed that she did not remember it at the time and did not mention the fact of their presence when she furnished her affidavit.

Merced testified that based on his having heard Maraber's description of the Mexican, and his reviewing of a videotape taken by the union on April 22, he was able to identify the "Mexican" as Nick Buelna, who he knew to be a vice president of Respondent, who worked at its Los Angeles facility. The videotape in question was introduced into evidence, and was played at the trial. Maraber, after viewing the tape, identified the "Mexican" about whom she had testified earlier, as a person shown on the tape on several occasions, including one standing next to Grafstein. Merced after viewing the tape, identified this individual as Buelna.

As noted Respondent did not call Buelna as a witness, although it was given the opportunity to request an adjournment in order to bring him in from Los Angeles to testify. Instead, it chose to rely on documents from Respondent's records of travel for its officials. These documents demonstrate that Buelna arrived by plane in New York from Long Beach, California, on Monday, March 24, at 5:30 p.m., and that he returned to Long Beach, California, on Wednesday, March 26, on a 4:20 p.m. flight. The records also reflect that Buelna returned to New York by plane on Monday, April 21, at 5:30 p.m., and left for Long Beach on April 25 on an 11:20 a.m. flight.

Respondent as noted did not call Buelna as a witness. Nor did it call any other witness to testify about these records. Significantly, no evidence was presented that these were the only travel records Respondent had which reflected Buelna's travel or that Buelna was not or could not have been in New York on April 2, without having been reimbursed by Respondent for the travel.

Testimony was also offered by Merced that on April 22, he observed Thomas Bianco, Respondent's attorney, in the presence of Norman Grafstein, taking pictures of employees and union representatives during the course of a rally[5] conducted by the Union across the street from Respondent's facility. According to Merced, Bianco was using a digital camera, and was standing 50 feet away from the employees, when he saw Bianco point the camera towards employees and saw a flash go off.

Neither Bianco nor Norman Grafstein testified in this proceeding. While the complaint alleges that Respondent by Steven Grafstein engaged in photographic surveillance on various dates, no evidence was adduced concerning Steven Grafstein's activities on these or any other dates.

2. Analysis and Conclusions

It is well settled that absent proper justification, the photographing of employees engaging in union activities tends to create fear among employees of future reprisals and reasonably tends to interfere with protected activity in violation of Section 8(a)(1) of the Act. *National Steel & Shipbuilding Co.*, 314 NLRB 499 (1995), enfd. 156 F.3d 1268, 1271 (D.C. Cir. 1998); *Casa San Miguel*, 320 NLRB 534, 538 (1995); *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994); *Farm Fresh Inc.*, 305 NLRB 887, 890 (1991).

Proper justification for the photographing can be established, where the Employer demonstrates that it had a reasonable basis to have anticipated misconduct by the employees who were engaging in the protected conduct. *National Steel & Shipbuild-*

[4] She also testified that she had seen the Mexican previously at the facility, and described him as "a guy who is always with Norman [Grafstein]."

[5] The rally was 2 days before the election.

ing, supra. The mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Id. at 499; *F. W. Woolworth Co.*, 310 NLRB 1193 (1993).

Applying these principles to the above facts, I conclude that the credible evidence establishes that Respondent violated the Act by the conduct of Buelna in photographing employees engaging in protected activities.

I find contrary to the contentions of Respondent, that the testimony of Maraber was credible and in conjunction with the testimony of Merced supplemented by the tape submitted by the Union, establishes that Buelna was in fact the "Mexican" who Maraber testified had taken pictures of employees including herself, talking to representatives of the Union.

I found Maraber to be a believable and candid witness. While her testimony about the date of the incident as April 2 may not be accurate, I find this possible discrepancy to be inconsequential, and conclude that Buelna did in fact take the photographs as she testified of employees talking to representatives of the Union.

Respondent in this regard emphasizes the fact that the records submitted by it establish that Buelna was not in New York on April 2. Therefore, it argues that Maraber's testimony should be discredited entirely, in effect asserting that her testimony was a total fabrication. I cannot agree.

First of all, I note that although Respondent did submit evidence that Buelna was in New York from March 24–26, and again in late April, that evidence did not preclude a finding that he was in New York on other dates, including April 2, the date testified to by Maraber. Indeed Buelna may have come to New York by some means other than travel paid for by Respondent. Further although Respondent submitted the travel records as described above, there was no testimony in the record, that Respondent did not have other travel records which it did not submit, which may have shown that Buelna was in New York on April 2.

Most importantly of all, Respondent did not call Buelna as a witness to testify either that he was not in New York on April 2, or that he did not take photographs of employees on any other dates. In these circumstances, it is appropriate to draw an adverse inference against Respondent, for its failure to call Buelna as a witness, and conclude which I do, that if called, Buelna would have testified adversely to Respondent on these issues. *International Automated Machines, Inc.*, 285 NLRB 1122, 1123 (1987); *Jordan Marsh Stores*, 317 NLRB 460, 468, 475 (1995); *United Parcel Service of Ohio*, 321 NLRB 300 fn. 1 (1996); *Redwood Empire Inc*., 296 NLRB 369, 382 (1989); *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir 1988).

Accordingly, based on the above analysis I find that Maraber's credible testimony establishes that Buelna photographed employees engaged in protected concerted activities. Since Respondent has offered no evidence of any justification or reason for its photographing of its employees, it follows that it has thereby violated Section 8(a)(1) of the Act. I so find. *National Steel v. Shipbuilding*, supra.

The complaint also alleges that Respondent engaged in unlawful photographic surveillance by the conduct of Norman and Steven Grafstein. Since no evidence was adduced that Steven Grafstein engaged in any conduct whatsoever, the complaint allegation with respect to him must be dismissed. With respect to Norman Grafstein, the evidence discloses that he was present when Respondent's attorney, Thomas Bianco, photographed employees at a union rally on April 22. It could be argued that Respondent is therefore responsible for Bianco's conduct, due to Grafstein's presence. However, the General Counsel specifically disclaimed that it was asserting that Bianco was an agent of Respondent when he photographed employees, and has made no contention that Grafstein's presence when Bianco photographed employees, makes Respondent responsible for such activity. Therefore I shall also recommend dismissal of this complaint allegation with respect to Norman Grafstein.[6]

B. Threats and Promises

1. Facts

On March 25, Respondent conducted captive audience meetings of employees during which Norman Grafstein discussed the Union and the upcoming election. Grafstein read from cards during his speeches, but at times he would deviate from reading the cards, stop reading from the cards and make comments to the assembled employees. Grafstein conducted meetings both in the afternoon starting at 3 p.m., and in the evening for the night shift.

During the day-shift meeting, Grafstein used Supervisor Patricia Ortiz to translate into Spanish his comments to the employees. During the night-shift meetings, Grafstein used two employees Thomas Rivera (Silencio) and an employee named William _____ to assist in the translation process.

At both meetings employees were given the opportunity to ask questions and some of them did so. At both meetings Grafstein discussed with the employees the election process, and that an election was scheduled for April 24. He urged everyone to vote, and told them that Respondent was required to provide to the Union the names and addresses of employees, as part of the election process. He added that he was sorry if anyone was offended by that, if they didn't want to be contacted. Grafstein also talked about how competitive the industry was and that Respondent was competing with China, Vietnam, and Thailand. He also stated that he was proud of the fact that the benefits received by the employees were good including health benefits.

Grafstein also told employees that he had investigated the Union, and found out that it was run by the Fazio family, and that four members of the family received a salary of more than $481,000 from the Union last year. He added that the Fazio family were members of the "mafia," and asked "how do you feel about another family controlling your future"?

[6] I note that even if it were found that Norman Grafstein's conduct of being present when Bianco took photographs of employees makes Respondent responsible for such conduct, such a finding would be cumulative, in view of my prior findings concerning Buelna's conduct, and would have no effect on the remedy.

Grafstein informed the employees that he didn't think that the employees needed a union and that the Union was "no good" for the employees. Grafstein added the employees did not need a Union to talk to Respondent and that if they wanted they had an open forum.

Grafstein also informed the employees that if the Union won, raises would not be automatic, and that it was a long process.

Employees asked questions about whether Wayne and Jackie, two supervisors who had been terminated would be coming back after the election. Apparently there had been complaints from employees about these supervisors, and as a result, Respondent terminated them. A rumor had surfaced in the shop, that Respondent had "stored these supervisors in California," and that after the election they would be returning. Grafstein assured the employees that this rumor was not correct, and that neither Wayne nor Jackie would be returning.

Employees also mentioned that Wayne had previously promised them wage increases, in the past, and such raises were not received, so why should the employees believe Grafstein when he tells them that things would "change" in the company. Grafstein replied that the big change in the company would be that employees would have an open forum to communicate with management directly.

While at one point at both meetings, Grafstein did tell employees that he could not make any promises, during the meeting on the day shift, Grafstein put down his cards and told employees "if you vote no for the Union, we will give you more money," and "if you vote yes for the Union, you will get fired."

At one point during the evening-shift meeting, Grafstein informed the employees that if the Union gets in, the employees would lose their jobs.

The above findings with respect to the statements made by Grafstein at the meetings of March 25, is based on a compilation of the credited portions of the testimony of Maraber, employee Evilio Ramires, and Kimberly Rodriguez, Respondent's director of human resources, who was Respondent's only witness.

I have credited the testimony of Maraber and Ramirez that Grafstein made the comments about job loss and discharge as described above, since their testimony on this subject is mutually corroborative. I also found Maraber to be particularly credible, since she was able to testify in English about the words used by Grafstein in these meetings, as well as in Spanish through the translator.

I also place significant reliance on the failure of Respondent to call Grafstein as a witness to deny or explain these statements. It is particularly appropriate to draw an adverse inference against Respondent here, where it has not called the person who actually made the alleged statements concerning the Union. *Redwood Empire Inc.*, 296 NLRB 369 fn.1 (1989); *International Automated Machines*, supra.

Although Respondent did call Rodriguez who was present at the meetings to deny the testimony of the employees, I note that Rodriguez could not be certain that Grafstein did not deviate from reading from cards during the meetings, and Respondent did not introduce into the record the cards that Grafstein read from throughout the meetings. More importantly, it was Grafstein who made the statements, and the failure to call him as a witness, without an explanation leads to the drawing of an adverse inference against Respondent, as I have detailed above. The fact that Respondent produced another witness to the meetings is insufficient to overcome that adverse inference, particularly where as I have explained, I found the testimony of the employees to be credible. Further, the Board has held that the production of weaker evidence where stronger evidence is available leads to an adverse inference to the producer of the weaker evidence. *Jennie-0-Foods Inc.*, 301 NLRB 305, 333 (1991); *Automobile Workers (Gyrodyne Co.) v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). Thus, the calling of Rodriguez, rather than Grafstein, also calls for an adverse inference against Respondent. *Jennie-0-Foods*, supra.[7]

2. Analysis and Conclusions

Based upon my findings described above, I have found that at the meetings of March 25, Respondent by Grafstein, told employees that if the Union gets in or if they vote for the Union, they would lose their jobs or get fired. These statements are clearly unlawful threats of loss of employment and are violative of Section 8(a)(1) of the Act. *Feldkamp Enterprises*, 323 NLRB 1193 (1997); *Sunnyside Home Care*, 308 NLRB 346, 347 fn. 1 (1992).

I have also found that during the day-shift meeting, Grafstein told employees that they would get more money if they voted against the Union. These comments are also clearly unlawful promises of benefits in violation of Section of 8(a)(1) of the Act. *Shen Automotive Dealership Group*, 321 NLRB 586, 591 (1996); *Beverly Enterprises*, 322 NLRB 334, 344 (1996); *Cummins Component Plant*, 259 NLRB 456, 460 (1989).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By photographing its employees while they engaged in protected concerted activities, threatening its employees with discharge and job loss if they support or vote for the Union in an NLRB election, and by promising its employees wage increases if they withdraw their support for the Union or vote against the Union in an NLRB election, Respondent has violated Section 8(a)(1) of the Act.

4. The above described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Based upon the foregoing findings of fact and conclusions of law and based upon the entire record, I issue the following recommended[8]

[7] Moreover, it would even be appropriate for me to draw an adverse inference against Respondent for its failure to call as witness Ortiz, William, and Rivera, whom it used as interpreters at the meetings. *Grimmway Farms*, 314 NLRB 73 fn. 2 (1994). However, I find it unnecessary to do so in these circumstances, since the adverse advertence for the failure to call Grafstein is more than sufficient to support my credibility findings as described above.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, North American Enclosures, Inc., Central Islip, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Photographing its employees while they engage in activities on behalf of Local 348-S United Food and Commercial Workers Union, AFL–CIO (the Union), or engage in other protected concerted activities, without proper justification.

(b) Threatening its employees with discharge, job loss or other reprisals, if they support the Union or if they vote for the Union in an NLRB election.

(c) Promising its employees wage increases, or other benefits and improvements in their terms and conditions of employment, if said employees withdraw their support from the Union in an NLRB election.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Central Islip, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ~~closed the facility involved in these proceedings, the Respon-~~

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 25, 2003.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 6, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT photograph our employees while they engage in activities on behalf of Local 348-S United Food and Commercial Workers Union, AFL–CIO (the Union), or engage in other protected concerted activities, without proper justification.

WE WILL NOT promise our employees wage increases, or other benefits and improvements in their terms and conditions of employment, if our employees withdraw their support from the Union or vote against the Union in an NLRB election.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

NORTH AMERICAN ENCLOSURES, INC.